(3)

87-1495

No. _____

In the
Supreme Court
of the
United States
October Term, 1987

TALLAHASSEE BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL.,

Petitioners,

vs.

LEON COUNTY, FLORIDA, ET AL.,

Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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February 1988

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QUESTIONS PRESENTED

1. Whether a remedial apportionment plan proposed by a local government as a replacement for it's existing plan, which was held to violate Section 2 of the Voting Rights Act, loses it's character as a "legislative plan" because state law makes no provision for changes in methods of electing county government except by voter referendum.

2. Whether a single definition of "legislative plan," -- that set out in McDaniel v. Sanchez, 452 U.S. 130 (1981) -- should apply in all voting rights litigation.

Petitioners are:

Tallahassee Branch of the National Association for the Advancement of Colored People; Anita L. Davis; Harold M. Knowles; Nelson E. Bennett; Mabel J. Sherman; Arthur Hubbard, III,; Raymond Thompson; Charles U. Smith; and Leonard L. Inge, on behalf of themselves and all others similarly situated.

Respondents are:

Leon County, Florida; Lee Vause, Chairman Commissioner; Gayle Nelson; Robert K. Henderson; William J. Montford; Henry Lewis, III; Don C. Price; and Gary Yordon, County Commissioners of Leon County, Florida, their successors and agents, all in their official capacities.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, LEON COUNTY, FLORIDA, ET AL., assert that the opinion of the United States Court of Appeals for the Eleventh Circuit Court was correct and does not present any grounds for review by the Court that are within the spirit of Supreme Court Rule 17.

OPINIONS BELOW

The opinion of the Court of Appeals, dated September 21, 1987, is reported at 827 F. 2d 1436. Petitioners have included a reprinted version of the opinion in the Appendix to their Petition. However, their reprint contains serious typographical errors, including omissions of words, sentences, and paragraphs. A correct copy of the opinion is contained herein as Appendix A.

STATUTORY PROVISIONS INVOLVED

Although the case below was brought under Section 2 of the Voting Rights Act, 42 U.S.C. Sec. 1973, as amended, no issue concerning that act is raised by the petition. Petitioners concede that the plan proposed by the Defendants below and adopted by the District Court complies with the requirements of Section 2.

STATEMENT OF THE CASE

In the case below, brought under Section 2 of the Voting Rights Act, Plaintiffs challenged the method of electing the Leon County Board of County Commissioners. There was no trial on the merits because the Defendants conceded that the existing at-large method of electing the County Commission diluted the voting strength of the county's black citizens. Upon Plaintiffs' concession that the Defendants proposed mixed plan (five single member districts, two at-large seats) complied with the Voting Rights Act, its implementation was ordered by the District Court. The District Court considered the plan proposed by the Defendants to be "legislative", and evaluated it accordingly.

The sole issue raised by the petitioners in the trial court, in the Court of Appeals, and in this Petition,

is whether the replacement apportionment plan proposed by the Leon County was entitled to the deference normally afforded "legislative" plans. Petitioners contend that the plan should not be considered to be "legislative" because Leon County, as a non-charter county, can voluntarily change its method of election only through a referendum. Petitioners further contend that the courts below were mistaken in their reliance upon this Court's definition of a "legislative plan" set out in McDaniel v. Sanchez, 452 U.S. 130 (1981).

REASONS FOR DENYING THE PETITION

Petitioners seek review of the decision of the court below on the grounds that (1) it is contrary to a decision of this court; (2) it is in conflict with a decision from another circuit; and (3) it raises important issues concerning the substantive

standards that govern remedial apportionment plans, to wit, whether the courts below erred in concluding that an apportionment plan offered by a governmental entity that lacks the authority under state law to change its electoral system, absent voter approval, is entitled to the deference normally afforded legislative plans.

The decision below is not contrary to the decisions of this court. It is not in conflict with a decision from another circuit. The decision does involve an important matter of federal law, but the issue it raises has been implicitly, if not expressly, decided by this Court in a manner consistent with the decision below, and with the decisions of a majority of the lower courts that have considered the issue.

A. The decision of the court below to defer to the legislative judgment of

the County Commission is in accord with decisions of this Court.

Since Reynolds v. Sims, 377 U.S. 533 (1964), the Court has recognized that matters of apportionment are best left to legislative bodies. Even when an existing scheme has been judicially invalidated, it is appropriate to allow the legislative body to adopt a substitute. Wise v. Lipscomb, 437 U.S. 535 (1978). In recognition of the principle, the District Court allowed the Board of County Commissioners to propose a replacement for the County's at-large election scheme invalidated under the Voting Rights Act. Petitioners contend that was in error because the long standing rule of deferring to the legislature does not apply to a legislative body that lacks the authority under state law to change the method by which it is elected. In the

absence of this authority, Petitioners contend, the legislative body's proposed remedy is entitled to no special deference, and any plan adopted must comply with the requirements for "court-ordered" plans, including the requirement of all single member districts.

Petitioners concede that under this Court's most recent decisions defining "legislative plans," McDaniel v. Sanchez, 452 U.S. 130 (1981), the plan proposed by the Leon County Board of County Commissioners and adopted by the District Court is legislative. They argue, however, that McDaniel is not controlling because it should be limited to its facts.

The issue in McDaniel was whether a reapportionment plan adopted in response to federal court litigation was subject to the preclearance requirements of Section 5 of the Voting Rights Act. This Court elected to answer that question by

classifying the plan. A legislative plan must be pre-cleared; a court ordered plan is not subject to Section 5. To classify the plan at issue in McDaniel, this Court turned to Wise v. Lipscomb, 437 U.S. 535 (1978), a case in which the issue was the deference a federal court was to afford a remedial apportionment plan proposed by a local governing body. This Court adopted the following language from Justice Powell's opinion in that case:

> ..the essential characteristic of a legislative plan is the exercise of legislative judgment.
>
> The fact that particular requirements of state law may not be satisfied before a plan is proposed to a federal court does not alter this essential characteristic. 425 U.S. at 144

Petitioners correctly assert that the only issue in McDaniel was whether the

plan was "legislative" for preclearance purposes. However, their further assertion -- that the definition should be limited to answering the preclearance issue, and a different definition employed when the issue is the degree of deference due policy judgments made by local governmental bodies -- is without merit. Not a single member of the Court chose to limit the definition to the issue before the Court.

Unquestionably, the policy basis for McDaniel was that of providing the broadest possible coverage for Section 5, thereby assuring that all election law changes in jurisdictions subject to its provisions obtain the specialized federal scrutiny required therein. It is also beyond question, however, that this Court resolved that issue by classifying the plan as legislative, and the definition selected came from Wise in which the issue was not the application of Section

5, but whether the plan proposed by the City, a defendant in a vote dilution case, was entitled to deference as a legislative plan.

Petitioners contend that rather than following this Court's definition in McDaniel, which was taken directly from Justice Powell's opinion in Wise, the courts below should have followed the arguably different definition of "legislative" found in Justice White's opinion in Wise. In Wise, the City of Dallas conceded that its at-large election plan diluted minority voting strength in the City. The City proposed a remedial plan that contained a mixture of single-member and at-large seats. This plan was adopted by the District Court as a legislative plan. Lipscomb v. Wise, 399 F. Supp. 782, 792 (N.D. Tex. 1975). The Court of Appeals reversed, holding, in reliance on East Carroll Parish v. Marshall, 424 U.S. 636 (1976), that the

plan was court ordered, and thus could not include at-large seats. Lipscomb v. Wise, 551 F. 2d 1043 (5th Cir. 1977). This Court reinstated the judgment of the district court.

The six members of the Court who agreed that the plan in Wise was legislative split four to two as to the basis for that consideration. In the opinion subsequently followed in McDaniel, Justice Powell, joined by the Chief Justice, Justices Blackmun, and Rehnquist, wrote that "the rule of deference to local legislative judgments remains in force even if our examination of state law suggests that the local body lacks authority to reapportion itself." 437 U.S. at 548. The key inquiry, he stated, is whether the body "exercised a legislative judgment, reflecting the policy choices of the elected representatives of the people, rather than the remedial directive of a federal

court." Id.

Petitioners contend that the controlling opinion in Wise is not that of Justice Powell, but rather the opinion written by Justice White, who was joined only by Justice Stewart. In defining the plan before the Court as legislative, Justice White apparently felt compelled to distinguished the Court's decision in East Carroll Parish. There the Court held that the all-single member district plan ordered into effect by the lower court was not subject to Section 5 preclearance because it was "court-ordered." The distinguishing factor, according to Justice White, was that the defendants in East Carroll"...did not purport to reapportion themselves and, furthermore, could not even legally do so under federal law because state legislation providing them with such powers had been disapproved (under Section 5)..." 437 U.S. at 545. The situation was different

in Dallas, because, while the power to reapportion was not specifically granted to the City, it was not specifically disallowed either.

Justice White had already concluded that the City had the authority to apportion itself. Therefore, he did not have to decide whether the absence of such authority would deprive the City's proposed remedy of the normal deference afforded legislative bodies in apportionment matters. Thus, Petitioners have misleadingly characterized the holding in Wise as being "that a remedial reapportionment plan proposed by a local governing body cannot be considered a legislative plan and accorded the deference applicable to legislatively adopted plans if the political body proposing the plan lacks legal power to apportion itself." Brief of the Petitioners, 15. It is true that Justice Powell characterized Justice White's view

of East Carroll Parish as compelling such a conclusion ("..Mr. Justice White's statement that East Carroll School Bd. stands for the proposition that a plan submitted by a political body without power to reapportion itself cannot be considered a legislative plan..." 437 U.S. 535), and was, because of his reading, prompted to write a separate opinion to voice his disagreement. Justice White's opinion is, however, subject to other interpretations -- particularly in light of his having subsequently voted with the majority in McDaniel.

The decision of the courts below classifying the plan at issue here as "legislative" is consistent with McDaniel, and with one of the opinions rendered in Wise. It is not clearly inconsistent with the other opinion from Wise. That McDaniel should be controlling in all definitions of

"legislative" is not a matter of confusion in the lower courts. A majority of courts to actually confront the issue are in accord with the decision of the Eleventh Circuit Court of Appeals in this case. See McMillan v. Escambia County, 559 F. Supp. 720, 724 (N.D. Fla. 1983): "Justice Powell's concept as a principle has equal force whether it is applied in a voting dilution suit or in a Section 5 pre-clearance suit." See also, Farnum v. Burns, 561 F. Supp. 83, 92 (D. R.I. 1983): "Deference to the defendants' plan is particularly appropriate in light of this Court's ruling at trial that it is a legislative plan. This conclusion was based on [McDaniel]. "See also, Potter v. Washington County, Florida, 653 F. Supp. 121, 125 (N.D. Fla. 1986).

B. The decision below is not in conflict with a decision of another circuit.

Petitioners assert that the decision below is in conflict with an en banc decision of the Fifth Circuit, League of United Latin American Citizens Council No. 4386 v. Midland Independent School Dist., 829 F. 2d 546 (5th Cir. 1987). The defendant School Board offered several mixed plans to replace its at-large election plan invalidated under Section 2 of the Voting Rights Act. Under Texas law, all such plans were required to allocate no fewer than 70% of the board members to single member districts. None of the Board's proposals met that requirement. Thus, the Board's proposed plans were substantively in violation of state law, and in actual derogation of the higher authority of the state legislature to mandate methods of election for local governments. The Fifth Circuit refused to extend the notion of deference to the legislative body that far.

The plan at issue here is clearly distinguishable. Florida law specifically allows non-charter counties to elect their governing bodies from five/two "mixed" plans. The substantive decision concerning the remedial plan was clearly consistent with the policy of the legislature. Missing in Florida law is a provision for a non-charter county to change its method of election without voter approval. Seeking voter approval of the method proposed in this case was not practical, since there was a significant possibility that the voters would have voted to retain the at-large system, invalid under Section 2 of the Voting Rights Act. Compliance with the procedure for changing the method of election was impossible under the circumstances. The procedure set out by the legislature would not have been any better followed had the District Court adopted the plan proposed by the

Plaintiffs.

C. The decision below did not sanction an evasion of state policy by a local government.

Petitioners' contention that in defering to the Commissioners the courts below sanctioned a plan "enacted in violation of state law and state legislative policies" (Brief of Petitioners, 20) is totally without merit. On the issue of the appropriate body to make changes in election laws, state law and policy is to place that decision in the hands of the electorate. Furthermore, the policy is to leave in place at-large elections for non-charter counties unless the voters elect a change. Federal law invalidated the retention of at-large elections for Leon County. The decision concerning whether to change election methods has thus been

taken from the voters -- not by the actions of the Commissioners, but by the operation of the Voting Rights Act. To call for a referendum at this point is impractical, unless "retention of at-large elections is removed as an option for the voters.[1]

When faced with an involuntary change in methods of electing county government, Florida law expresses no preference or policy concerning who should make that the decision in the voters' stead. Absent some evidence of a contrary state policy, the Federal policy of deference to the

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[1]Petitioners have not suggested that there be a referendum for the voters to decide. Rather they suggest that because the referendum was not held, the Petitioners should select the method of electing Leon County's governing body. They do not explain why this would be more consistent with state law than leaving the decision to the Board of County Commissioners.

legislative body should prevail. In selecting the five/two mixed system, the Board of County Commissioners has selected a method of election endorsed by the state legislature for non-charter counties, and has retained as much of the at-large election system favored by state law as federal law will allow.

CONCLUSION

In defering to the legislative judgment of the Board of County Commissioners on the matter of a remedial election plan, the Eleventh Circuit Court of Appeals has adhered to a long line of decisions of this Court. It has faithfully applied this Court's most recent definition of "legislative plan", set out in McDaniel, and its interpretation of that case is consistent with that of the other lower courts to consider the issue. In the absence of conflict with decisions of this Court, and in the apparent absence of confusion

among the lower courts concerning the controlling authority of McDaniel on the issue of defining "legislative plans", no further review of this case is needed and the petition for certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true and correct copies of the foregoing has been furnished by U.S. Mail this 26th day of February, 1988, to Robert E. Weisberg and David M. Lipman, 5901 S.W. 74th Street, Miami, Florida, 33143-5186, Attorneys for Plaintiffs; and Katharine I. Butler, University of South Carolina, College of Law, Columbia, South Carolina, 29208.

F.E. Steinmeyer, III
Attorney at Law

APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

TALLAHASSEE BRANCH OF THE NATIONAL ASSOCIATON FOR THE ADVANCEMENT OF COLORED PEOPLE, et. al.,

Plaintiff,

v.

LEON COUNTY, FLORIDA, et. al.,

Defendant.

CIVIL ACTION NO. TCA 83-7480

MEMORANDUM DECISION

THIS CAUSE is before this Court on the issue of the appropriate remedial election plan for the Leon County Board of County Commissioners. The present at-large plan was invalidated by order of this Court dated March 16, 1986, pursuant to the Defendants' stipulation that they would not defend the existing at-large election system against Plaintiffs complaint that the plan violated Section 2 of the Voting Rights Act.

Trial on the remedy was scheduled to commence June 2, 1986. On May 30, 1986, pursuant to motions of both

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parties, this Court agreed to rule on the issue of whether the "mixed plan" proposed by the Defendants was to be evaluated as "legislative" or "court-ordered". Decisions of the Supreme Court indicate that "court-ordered" plans must adhere to stricter standards than those proposed by legislative bodies.

Plaintiffs concede that the Defendants' plan calling for the Board of County Commissioners to be elected for five single member and two at-large seats complies with Section 2 of the Voting Rights Act. They contend, however, that because the county lacks the authority under state law to change its election system absent voter approval, the Defendants cannot propose a plan to the Court as a legislative plan. Plaintiffs' position is that any plan adopted by this Court, regardless of its origin, must comply with the special requirements for court-ordered plans, most specifically, the requirement that absent special circumstances, such plan contain only single-member districts. East Carroll Parish School Board v. Marshall, 424 U.S. 636, 639 (1956). For the reasons set out below, I reject Plaintiffs' contention, and find the plan offered by the Defendants to be "legislative" and thus entitled to the deference normally afforded legislative judgment in apportionment matters. In light of Plaintiffs' concession

that the proposed plan complies with the Voting Rights Act, it is hereby ordered that said plan be put into effect in the next regularly scheduled election.

Florida Law on Election Options Available to Counties

Prior to November, 1984, an at-large election system was the only method of election available to non-charter counties, such as Leon. Florida Constitution, Article VIII § 1(e). In 1984, the Constitution was amended to remove this limitation and to allow commissioners to be elected as provided by law. In 1985, Section 124.011 (Fla. Stat. [1985]) was enacted to allow non-charter counties the option of five single member districts, or a seven person Board, five elected from districts and two elected at-large. Absent voter approval pursuant to a referendum, however, all non-charter counties were to retain at-large elections.

Unlike non-charter counties, charter counties are not limited to the methods of election set out in Florida Statutes, Chap. 124. On October 2, 1985 this Court granted Defendants' Motion for Continuance to allow the County Commission to submit to the voters a change to charter government, to be elected pursuant to a 4-3 mixed election

plan. The change was rejected by the voters.[1] Thus, Leon County remains a non-charter county and as such is limited to the methods of election set out by statute, and may voluntarily change methods only with approval of the voters.

Applicable Law

Starting with Conner v. Johnson, 402 U.S. 690 (1971) the Supreme Court recognized that election plans imposed by federal courts on state and local governments must comply with stricter standards than those derived from legislative mandates. Lacking the political mandate to identify and reconcile competing state policies, a federal court has less latitude than does the legislative body. Absent special circumstances, court ordered plans must

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[1] In their pre-trial memorandum on the issue before me, the Plaintiffs indicate that the voters rejected a proposal similar to the plan Defendants now offer. From this they conclude that the voters have spoken, and the Commission should not be allowed to circumvent their judgment. It is not clear what the voters were rejecting. The change to charter county status may have been the important factor rather than the mixed plan. This Court cannot assume that just because the voters rejected a charter calling for one mixed system that they likewise would reject another mixed system which is available to non-charter counties. The voters could just as easily be seen as favoring retention of the at-large system, an option no longer open to them.

achieve population equality with only deminimus variation Chapman v. Meier, 420 U.S. 1 (1975), and absent special circumstances, must avoid the imposition of multi-member districts. Id. at 19.

The stricter standards for court ordered plans do not, however, become applicable until such time as the court is called upon to substitute its judgment for that of the legislative body. The Supreme Court has consistently recognized that apportionment is a legislative matter. Reynolds v. Sims, 377 U.S. 533 (1964); Upham v. Seamon, 456 U.S. 37 (1982). Until the point is reached where the legislature is unwilling or unable to act, the Court is to defer to the legislative judgment. Even when an existing scheme has been judicially invalidated, it is appropriate to allow the legislative body to adopt a substitute. Wise v. Lipscomb, 437 U.S. 535 (1978).

Plaintiffs have agreed that Defendants' proposed plan complies with the Voting Rights Act. "But for" the absence of specific authority of counties to change their method of election, there would be agreement that the plan proposed by the Defendants is a legislative plan. Plaintiffs maintain, however, the absence of this authority removes any requirement that this Court consider it to be a legislative plan.

Although the Supreme Court earlier had distinguished between "court-ordered" and "legislative" plans, in terms of applicable standards, the first delineation of the distinction appeared in Wise v. Lipscomb, 437 U.S. 535 (1978). Wise was a dilution case in which the City of Dallas, Texas conceded that its at-large election plan diluted minority voting strength. The city was allowed to propose a substitute. The district court accepted the City's mixed plan as "legislative". The Court of Appeals reversed, holding it was court ordered. The Supreme Court reinstated the district court opinion. There was no majority opinion in Wise. Six members of the Court believed the plan to be legislative, but they split 4 to 2 on the issue of the importance of Dallas' authority to apportion itself. Justice White announced the ruling of the Court and wrote an opinion joined only by Justice Stewart. In their opinion, Dallas had the requisite authority. Justice Powell wrote a separate concurring opinion in which the Chief Justice, Justices Blackmun, and Rehnquist joined. Justice Powell was of the view that the authority of the City of Dallas to apportion itself was immaterial to the issue of whether the plan should be classified as legislative. Rather, the inquiry was whether the plan reflected the

policy choices of the people's elected representatives. (Justices Marshall, Brennan, and Stevens dissented.)

In McDaniel v. Sanchez, 452 U.S. 130 (1981) the Court again considered the definition of "legislative" plan. McDaniel involved the question of when a plan produced in response to federal court litigation must be pre-cleared under Section 5 of the Voting Rights Act. The Court elected to answer the question by classifying the plan. A legislative plan must be pre-cleared. A court ordered plan is not subject to Section 5. To classify the plan, the Court turned to Wise, and adopted Justice Powell's definition of "legislative":

> As Justice Powell pointed out in Wise v. Lipscomb, supra, the essential characteristics of a legislative plan is the exercise of legislative judgment. The fact that particular requirements of state law may not be satisfied before a plan is proposed to a federal court does not alter this essential characteristic. The applicability of Section 5 to specific remedial plans is a matter of federal law that federal courts should determine pursuant to a uniform federal law.
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> 425 U.S. at 144

While Plaintiffs are correct in their assertion that the only issue before the McDaniel court was whether the plan was "legislative" for purposes of pre-clearance, there is little support for their belief that the Court

would adopt a different definition of "legislative" when the issue is the degree of deference due policy judgments made by local governmental bodies. Not a single member of the Court chose to limit the definition to the issue before the Court. Furthermore, as a matter of federal law, there is no justification for having the application of federal standards be determined by chance variations in state law, particularly when state law never contemplated the involvement of a federal court in the apportionment process.

The only courts to actually confront the issue have concluded that McDaniel's definition of "legislative" applies in non-Section 5 cases as well. See Judge Arnow's opinion in McMillan v. Escambia County, 559 F.Supp. 720, 724 (1984): "Justice Powell's concept as a principle has equal force whether it is applied in a voting dilution suit or in a Section 5 pre-clearance suit." See also Farnum v. Burns, 561 F.Supp 83, 92 (1983): "Deference to the defendants' plan is particularly appropriate in light of this Court's ruling at trial that it is a legislative plan. This conclusion was based on [McDaniel]." (Farnum involved the apportionment of the Rhode Island Legislature, a jurisdiction not subject to Section 5 coverage.)

Plaintiffs rely on an opinion rendered by a panel of the Fifth Circuit in McMillan v. Escambia County, 688

F.2d 860 (1982), a decision rendered prior to Judge Arnow's Opinion cited above. In that case, which makes no mention of McDaniel, the Court concludes that under the controlling analysis of Wise, (which the Court finds to be Justice White's opinion)[2], a plan cannot be legislative if the body proposing it lacks the authority under state law to apportion itself. Plaintiffs conclude that the panel deciding McMillan must have concluded that McDaniel was not applicable since McDaniel was decided over a year earlier. Equally plausible is the view adopted by Judge Arnow in Escambia on remand: "It [McDaniel] was not mentioned in the Appellate Court's decision for rehearing and, so this Court is advised, the parties to the appeal did not call it to the Appellate Court's attention." 559 F.Supp. at 723.

Even if Plaintiff is correct that McDaniel is not direct authority for this case, it is at the very least persuasive authority for the definition of a legislative plan. Furthermore, four sitting members of the Supreme Court would, under Wise, label Defendants' plan

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[2] The Court arrived at Justice White's opinion as controlling on the assumption that the three dissenters, who believed the plan in that case to be "court ordered", would take Justice White's more restrictive view of "legislative," rather than the more expansive view adopted by the four Justices in the other opinion.

"legislative." In light of these facts, McMillan cannot be seen as controlling authority.

CONCLUSION

The plan proposed by the Leon County Commission is the product of legislative judgment. It is a legislative plan regardless of whether the Commission has the authority under state law to apportion itself. Plaintiffs have agreed that the plan complies with Section 2 of the Voting Rights Act, and is, therefore, not dilutive. The primary rationale behind prohibiting at-large seats is to avoid submerging minority voting strength. Since Plaintiffs concede that no dilution will result from their inclusion, it is difficult to imagine what federal policy would be furthered by this Court's imposition of an all single membered district plan.

The remedial plan adopted by the County Commission will be put into effect by order of the Court.

June 13, 1986

William Stafford

WILLIAM STAFFORD
Chief Judge